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FILED
OCT 26 2005
OFFICE OF THE CLERK

No. 05-381

IN THE

Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

ROSS-SIMMONS HARDWOOD LUMBER CO., INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN MEAT INSTITUTE IN SUPPORT OF WEYERHAEUSER COMPANY'S PETITION FOR A WRIT OF CERTIORARI

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THE INTEREST OF THE AMICUS CURIAE

The American Meat Institute (AMI) is the oldest and largest meat and poultry trade association in the United States. Its two hundred packer/processor member companies account for more than ninety percent of the nation's meat products and approximately seventy percent of the nation's turkey products.

Some meat packers own and raise some of the livestock they process, but almost all of the largest packers also make substantial purchases through various types of arms-length transactions, including open-market "spot" transactions and supply contracts. A single packer may have dozens of buyers purchasing livestock from thousands of livestock producers in different regions of the country.

The decision below, upholding antitrust liability for paying a higher price for inputs "than necessary," and buying more inputs "than . . . needed," casts a cloud of uncertainty over the routine buying decisions that AMI's members must make daily.

AMI sought and received consent from both parties to file this brief in support of the petition for certiorari in this case, and those consents are on file with the Clerk.[1]

STATEMENT

To appreciate the havoc that the decision below wreaks, imagine that you are a lawyer counseling a beef processor. The purchasing committee is anticipating significant demand growth (perhaps because of increasing exports to developing countries, or possibly a large customer has indicated it plans to run a number of beef features in the coming quarter), and your client would like to ensure that it is able to meet that demand. Your client is considering a significant increase in its spot market purchases of fed cattle, and plans to begin running Saturday shifts at its packing plant to accommodate the extra volume.

The morning conference call of the purchasing committee is about to begin. The call will decide the price point at which the company's many buyers will seek to purchase fed cattle from hundreds of suppliers on the open market that morning and throughout the day. The committee knows that, to get increased volumes, it will have to offer higher prices. It also knows that a small independent beef processing plant has recently opened, having made its investment decisions at a time when demand was low. If livestock prices rise—especially if the small rival lacks the infrastructure to serve the new downstream markets—the new rival will be far less profitable than it had expected, and may even lose money.

Is the committee free to make its decision purely on business grounds, or must it hold prices artificially low to avoid harming the

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[1] No party authored this brief in whole or in part, and no monetary contributions to the preparation or submission of this brief were made by anyone other than AMI and its members.

rival? If it decides purely on the basis of business considerations, what will a jury make of the sudden jump in prices under a jury instruction that demands that prices be "fair" or "no higher than necessary"? And will the advice you offer for this morning's call still be good for this afternoon's call and the calls in the coming days and weeks? Or, with supply and demand conditions—and even business strategies—constantly changing, will you have to separately evaluate each bid, contract offer, or futures price to determine, based on constantly changing market conditions and competitive dynamics, the likelihood that a jury may at some point in the future conclude that the prices bid or paid were "higher than necessary"?

Before the Ninth Circuit's decision in this case, you would have advised that as long as the company was not conspiring with other purchasers, and as long as the purchases were reasonably calculated to result in profitable sales, the company had little to worry about. You would further have advised that, in any event, if potential entry and other competitive conditions would prevent the company from recouping the cost of overpaying for inputs now by cutting prices for inputs or raising prices for outputs later, there was also nothing to worry about. But what will you advise now?

This is but one scenario illustrating the confusion and turmoil that is already flowing from the Ninth Circuit's sudden departure from basic economic principles and from the expectations that have formed around the precedents of this and other courts. The Court should grant the petition for certiorari in order to remove the antitrust uncertainty now surrounding input pricing for businesses like AMI's members and to clarify the antitrust standards that apply to this ubiquitous economic activity.

DISCUSSION

AMI submits this brief in support of petitioners because the decision below departs from principles laid down by this Court in ways that create widespread uncertainty for significant portions of the American economy, including the meat packing industry. By creating a false dichotomy between "predatory overbidding" for inputs and "predatory pricing" of outputs, the Ninth Circuit casts a shadow over many routine, day-to-day purchasing decisions. The

decision affects not only concentrated industries, but also, as in the instant case, industries in which the downstream markets (here, hardwood lumber) are highly competitive but inputs may be drawn from relatively concentrated (in terms of the number of buyers), geographically limited markets (here, alders in the Pacific Northwest).

The court below recognized, as it had to, that this Court's decision in *Brooke Group*[2] does not permit a finding of monopolization based on predatory pricing unless plaintiff demonstrates that:

> (1) 'the prices complained of are below an appropriate measure of its rival's costs,' and (2) 'a dangerous probability' existed that the rival would later 'recoup[ ] its investment in below-cost prices' once it stopped such pricing.[3]

The court below distinguished *Brooke Group*, however, on the theory that the predatory pricing there was on the "sell-side," whereas the predatory pricing in the instant case was on the "buy-side." It reasoned that "sell-side" predatory pricing would entail lower prices to consumers—something encouraged by the antitrust laws—whereas "buy-side" predatory pricing might not.

1.

Before turning to the ways in which the Ninth Circuit's analysis misreads *Brooke Group*, we note that this Court has previously, if implicitly, made clear that whether the purchase price of an input is anticompetitively high cannot be divorced from the price at which the finished product is ultimately sold. In *Cargill, Inc. v. Monfort Of Colorado, Inc.*,[4] the Court considered plaintiff Monfort's claim that, as a result of a challenged merger, defendant Excel "would bid up the price it would pay for cattle,

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[2] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[3] App. at 7a (quoting *Brooke Group*, 509 U.S. at 222, 223-24).

[4] 479 U.S. 104 (1986).

and reduce the price at which it sold boxed beef." *Id.* at 114. From this scenario the Court deduced two theories of injury:

> (1) a threat of a loss of profits stemming from the possibility that Excel, after the merger, would lower its prices to a level at or only slightly above its costs; (2) a threat of being driven out of business by the possibility that Excel, after the merger, would lower its prices to a level below its costs.

Id. In other words, bidding up the price for cattle affected competitors only to the extent it affected their ability to sell boxed beef profitably downstream. The Court then went on to analyze the competitive implications of the two posited forms of injury, and concluded that only the second—selling below cost—could constitute antitrust injury. Reducing one's margins by paying more for inputs or charging less for outputs—but without selling below cost—was "simply . . . vigorous competition." *Id.* at 116.

> The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. . . . The antitrust laws require no such perverse result, for '[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.'

Id. (citation omitted).

Thus, although this Court has not previously considered the issue worthy of extended discussion, it has assumed the equivalence between predatory pricing and predatory overbidding. Other courts and scholars have usually made a similar assumption[5]

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[5] The Fifth Circuit treated as obvious—relegating it to a parenthetical—the proposition that predatory overbidding for cattle requires paying "a price higher than that which would allow the packer to make a profit." *In re* Beef Industry Antitrust Litig., 907 F.2d 510, 515 (5th Cir. 1990).

and sometimes openly advocated parallel treatment.[6]

2.

In overturning those expectations and ruling that input pricing that was "higher than necessary" could constitute predation in violation of the antitrust laws, the Ninth Circuit rested its entire analysis on an attempt to distinguish *Brooke Group* as inapplicable to "predatory overbidding." That attempt fails in at least two respects. First, *Brooke Group* was not based simply on the benefits of low prices to consumers, but also on the rationality of inferences permitted to be drawn by the fact-finder. Second, unjustified interference with market mechanisms to keep prices to suppliers low is just as harmful to the economy and to consumer welfare as unjustified intervention to keep prices to consumers high.

a.

Brooke Group requires a plaintiff to demonstrate both that defendant has priced below cost and that defendant has "a dangerous probability[] of recouping its investment in below-cost prices."[7] The recoupment requirement flows from the fact that selling below the price that one could obtain for one's product is costly, and such a practice would not be rational unless one reasonably expected to obtain monopoly power. If such an expectation is unreasonable—because of low entry barriers, for example—then it would be improper for a fact-finder to infer that defendant was engaging in a predatory strategy that had a dangerous probability of success. Some other explanation, such as

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[6] Nearly twenty years ago, one of the seminal articles introducing the concept of "raising rivals' costs" as a mode of analysis for unilateral and vertical conduct observed, in a footnote, that a claim that overbuying is anticompetitive should "require proof that, as a result of the inefficient resource use from Overbuying, the purchasing firm's marginal cost is, in effect, driven up to a level above the price it receives for its output. This burden . . . is equivalent to the Areeda-Turner test for predatory pricing, as applied to input purchases." T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 YALE L.J. 209, 282 & n.228 (1986).

[7] 509 U.S. at 224.

competitive market forces, must explain the "low" pricing, or in this case "high" input prices.

As the Fifth Circuit has noted in another antitrust context: "If a frog be found in the party punch bowl, the presence of a mischievous guest—but not the occurrence of spontaneous generation—may reasonably be inferred."[8] Such reasoning is at the heart of the recoupment requirement of *Brooke Group*: a jury is not permitted to infer that a monopolist or would-be monopolist has engaged in predatory pricing unless such behavior is objectively rational. And, as the Court noted in *Brooke Group*, quoting its earlier decision in *Matsushita*: "For the investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered."[9] The Court went on to note that, in its opinion earlier that Term in *Spectrum Sports*, it had observed that

> it was not enough to inquire 'whether the defendant has engaged in 'unfair' or 'predatory' tactics'; rather, we insisted that the plaintiff prove 'a dangerous probability that [the defendant] would monopolize a particular market.'[10]

The *Brooke Group* recoupment requirement is thus a matter of rationality:

> For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals .... This requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will.

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[8] AT&T v. Delta Communications Corp., 590 F.2d 100, 102 (5th Cir. 1979).

[9] 509 U.S. at 224, quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

[10] 509 U.S. at 225, quoting Spectrum Sports v. McQuillan, 506 U.S.447, 459 (1993).

* * *

> If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market.

* * *

> If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed.

509 U.S. at 225-26. Recoupment, in other words, is a necessary element of a Section 2 offense for predatory pricing because a fact-finder is not permitted to draw irrational or implausible inferences, not simply because low prices may benefit consumers.

In the case of predatory overbidding, paying more for inputs that one could obtain for less is costly, just as selling below the price that one could obtain for one's product is costly. Just as in the predatory pricing scenario, such a practice would not be rational unless one reasonably expected to obtain monopoly power. If such an expectation is unreasonable, it is no more proper for a fact-finder to infer the existence of a predatory scheme than it would be in the predatory selling context. By allowing a jury to be instructed otherwise, the Ninth Circuit has greatly magnified the potential reach of its decision, to the detriment of a wide variety of markets in which entry barriers are low or recoupment is otherwise implausible.

b.

The Ninth Circuit also failed to appreciate that market-based, competitively determined "high" prices to suppliers are as beneficial to competition as market-based, competitively determined "low" prices to consumers. Thus, the court distinguished *Brooke Group* on the ground that "benefit to

consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." App. at 9a. That purported distinction departs both from fundamental economic principles and from this Court's precedents.

"Price is the central nervous system of the economy."[11] Price mediates supply and demand, drives investment decisions and helps to ensure that resources are allocated efficiently throughout the economy.

Indeed, the markets in which AMI's members participate provide an excellent illustration of the way in which the market adjusts prices to supply and demand with a flexibility no judicial process could match. Livestock that are purchased as inputs rather than raised in vertically integrated operations are sold to the meat packing and processing members of the AMI through two primary means. First, livestock may be purchased in "cash markets," which are comprised of hundreds of separate transactions with livestock producers and feedlots throughout the country. Prices also are set through live auctions at which potential purchasers directly bid against one another. Prices vary day-to-day (or more often) and location-to-location based on the numbers of buyers and sellers at a particular auction, demand for downstream products, the productivity of packing plants on the day of the auction, and many other individual factors. Second, livestock may be purchased through supply contracts that allow packers and livestock producers to control risk over time. Each contract is separately negotiated.

Any interference with the price mechanism has the potential to harm consumers, regardless of whether the tendency is to lower or to raise prices. This is so in at least two respects, one of which the court below acknowledged but did not fully deal with, and the other of which it did not even acknowledge.

As to the first, the Ninth Circuit recognized that "rising input prices might encourage new companies to enter the supply side of

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[11] National Soc'y of Prof. Engineers v. United States, 435 U.S. 679, 692 (1978), quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940).

the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements . . . ." App. at 11a. In the particular facts of the case before it, however, the court believed that the "nature of the input supply at issue . . . [did] not allow readily for market expansion." *Id.* In other words, the Ninth Circuit (though not the jury) concluded that the supply of alder logs was inelastic. Consequently, the Ninth Circuit felt justified in ignoring the possibility that its announced standard would deter procompetitive output expansions that benefit consumers.

But the Ninth Circuit's decision casts a shadow over markets with elastic and inelastic supply alike. The jury instructions approved by the Ninth Circuit did not account in any way for the "nature of the input supply at issue." Those instructions permitted the jury to conclude that the prices paid by Weyerhaeuser for alder sawlogs were "predatory" based solely on its determination that those prices were "higher than necessary." *Id.* at 7a n.8. We cannot know what the jury would have found about the elasticity of supply of alder sawlogs, but more importantly, we cannot know what a future jury would do if called upon to second-guess—under the subjective "higher than necessary" standard—the thousands of individual pricing decisions AMI's members and innumerable other companies make each year. Faced with the prospect of treble damages for pricing "too high," some companies will likely be unwilling, at least on the margin, to bid as high as they otherwise might in a competitive market. This will inevitably lead to the misallocation of resources to the detriment of consumers.

There is a more fundamental error in the Ninth Circuit's analysis, one that it did not even acknowledge. Wholly apart from the role of "high" prices in attracting additional investment into an existing market with elastic supply, economists, as well as this Court, have long recognized that the ability to charge what the market will bear plays another, equally important, function in driving investment and innovation. As this Court recently declared, "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it

induces risk taking that produces innovation and economic growth."[12]

The Ninth Circuit's reasoning, if applied to the patent system, would say that once the investments have already been made, the patent has been granted, and the product is on the market, it would do no harm to come in at that point and regulate prices downward. After all, if the patent is sufficiently broad and cannot be invented around, higher prices cannot attract any additional investment and output in that specific product. Such reasoning would be short-sighted in the extreme, because it would discourage investment in research that would lead to new inventions in the *future*.

Similarly, it is far too facile to suggest that, because the growth of alders is inelastic in the short run, it does no harm if the antitrust laws mistakenly deter a company like Weyerhaeuser from paying full value for alder logs. Allowing buyers to bid what they think the timber is worth, thus rewarding the alder growers for decisions made decades ago, is not designed simply to induce additional supply of timber in the short run, but rather to encourage the economy as a whole to function efficiently in the long run.

The Ninth Circuit's decision effectively places a thumb on the scale in favor of lower input prices, altering irrevocably the competitive relationships between input suppliers and purchasers. Such post-hoc pricing intervention is equally damaging whether applied to outputs or inputs.

To borrow the language of this Court's opinion in *Trinko*, "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"[13] This is just as true in the case of predatory bidding as in predatory selling. The Ninth Circuit's decision in this case failed sufficiently to account for those costs.

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[12] Verizon Comm'ns, Inc. v. Law Offices of Curtis V. Trinko LLP, 540 U.S. 398, 407 (2004).
[13] *Id.* at 414.

CONCLUSION

Review by this Court is necessary to undo the confusion and uncertainty flowing from the Ninth Circuit's departure from the principles of *Cargill* and *Brooke Group*.

Respectfully submitted,

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